178.

SUPREME COURT OF THE UNITED STATES.

No. 64.

THE MAYOR AND ALDERMEN OF THE CITY OF MOBILE, PLANTIFFS IN ERROR,

vs.

JONATHAN, EMANUEL & GEORGE S. GAINES.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

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S. D. Langtree, Print.

UNITED STATES OF AMERICA, *ss.*

The President of the United States, to the Honorable Judges of the Supreme Court of the State of Alabama, greeting.

Because in the record and proceedings, as also in the rendition of the Judgment of a plea, which is in the said Supreme Court, before you, or some of you, being the highest Court of Law, or Equity, of the said State, in which a decision could be had in the said suit, between the Mayor and Aldermen of the city of Mobile, plaintiffs, in said Supreme Court, and Jonathan Emanuel and George S. Gaines, defendants, in said Supreme Court, wherein was drawn in question the validity of a treaty, or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favour of such their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption, specially set up, or claimed under such clause of the said constitution, treaty, statute or commission, a manifest error hath happened, to the great damage of the said Mayor and Aldermen of the city of Mobile, as by their complaint appears—we being willing that error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of January next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States, should be done.

Witness, the Honorable Roger B. Taney, Chief Justice of the said Supreme Court, this 21st day of October, in the yearof our Lord one thousand eight hundred and forty.

Allowed by HENRY W. COLLIER,
Chief Justice of the Supreme Court of the State of Alabama.

MAYOR AND ALDERMEN of the city of Mobile, *vs.* EMANUEL & GAINES. } Pleas, &c.

Be it remembered, that heretofore, *to* wit, on the 29th day of June, 1838, were filed in the clerk's office of this court, a writ of error and transcript of record, in the following words and figures, to wit:

THE STATE OF ALABAMA.

To the Clerk of the Circuit Court for Mobile County, greeting:

Writ of Error.

Because in the record and proceedings, and also the giving of judgment, in a cause which was in our said Circuit Court, by our writ of capias ad respondendum, between the Mayor and Aldermen of the city of Mobile, plaintiffs, and Jonathan Emanuel and George S. Gaines, defendants, of a plea of trespass to try titles to land, manifest error hath intervened, to the great damage of the said Mayor and Aldermen of the said city of Mobile, as by their complaint we are informed. We being willing that the error, if any there be, should in due manner be corrected, and full, and speedy justice done to the parties in this behalf, do command you, that if judgment be thereupon given, then you send to our Judges of the Supreme Court, distinctly and openly, under your hand and seal, the record and proceedings of the cause aforesaid, with all things concerning the same, and this writ; so that they may have them before the Supreme Court at Tuskaloosa, on the first Monday in June next, that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon for correcting that error, what of right and according to law ought to be done.

Witness, Malcolm J. McRae, Clerk of our Circuit Court for Mobile County, this 27th day of March, in the year 1838.

Issued the 27th day of March, 1838.

Attest: M. J. McRAE, *Clerk.* [L. S.]

MAYOR AND ALDERMEN of the city of Mobile, *vs.* EMANUEL & GAINES.

Pleas before the Honorable Ezekiel Pickens, presiding Judge of the Circuit Court of Mobile County, at a Court begun and held in and for said County of Mobile, on the second Monday after the fourth Monday of October, in the year of our Lord one thousand eight hundred and thirty-seven.

Be it remembered, that heretofore, to wit, on the eighth day of July, in the year of our Lord one thousand eight hundred and thirty five, came the Mayor and Aldermen of the city of Mobile, and sued out of the office, Circuit Court for Mobile County, by our writ of capias ad respondendum against Jonathan Emanuel and George S. Gaines.

THE STATE OF ALABAMA.

To the Sheriff of Mobile County, greeting:

Writ.

You are hereby commanded, to take Jonathan Emanuel and George S. Gaines, if they be found in your County, and them safely keep, so that you may have them before the Honorable Circuit Court, to he holden for Mobile County, at the place of holding said Court, on the first Monday after the fourth Monday of October next, to answer to the Mayor and Aldermen of the city of Mobile, in a plea of trespass to try titles, to their damage ten thousand dollars; herein fail not, and have you then there this writ.

Witness, Joseph Bates, Jr., Clerk of the said Court, this eighth day of July, in the year of our Lord one thousand eight hundred and thirty-five.

Issued, this eighth day of July, in the year 1835.

JOSEPH BATES, Jr., *Clerk.*

Cause of Action.

This action is brought to try title, and recover possession of a lot or tract of land, in the city of Mobile, laid down in a plan of part the Orange grove tract, drawn by A. A. Dexter, and filed in the office of the County Court, Clerk of Mobile County, as lots number 1, 2, 3, 14, 15, 16, in square 244, commencing on the northeast corner of the intersection of State and Water streets, being one hundred and fifty feet on Water Street, running eastwardly across Commerce street, to the channel of the river, bounded south by State street, and west by Water street, and for damages for the detention of the premises.

Attest:

WM. HALE,
ISAAC H. ERWIN,
Attorneys for Plaintiffs.

Sheriff's Return.

Received and executed 14th July, 1835.

T. B. TOULNIEU,
Sheriff of Mobile C'ty.
By WM. MAGEE,
Deputy Sheriff.

And now at this day, to wit, came the plaintiffs by their Attorneys, and filed their declaration in the following words and figures, to wit:

STATE OF ALABAMA, *Mobile County.*

Circuit Court, Fall Term, 1835.

Declaration.

The Mayor and Aldermen of the city of Mobile, by Attorney, complains of Jonathan Emanuel and George S. Gaines, in custody, &c., of a plea of trespass with force and arms, &c. to try titles, for that heretofore, to wit: on the 7th day of July, A. D. 1835, at the County aforesaid, the said defendants with force and arms, broke, and entered in, and upon, a certain tract or lot of land, the property of plaintiffs, situate and being in the city of Mobile, and known as a lot laid down in a plan of part of the Orange grove tract, drawn by A. A. Dexter, and filed in the office of the County Clerk of Mobile County, as lots number 1, 2, 3, 14, 15 and 16, in square 244, commencing on the northeast corner of the intersection of State and Water street, in said city, being one hundred and fifty feet on Water street, running eastwardly across Commerce street to the channel of the river, and bounded on the south by State street, and on the west by Water street, and then and there ejected, expelled, put out, and amoved the said plaintiffs, from the possession, use, and occupation of said lots, and kept and continned them so expelled and amoved for a long space of time, to wit: from thence hitherto, whereby the said plaintiffs during that time lost and was deprived of the use and benefit of said lot, &c., to their damage ten thousand dollars.

WM. HALE, *Plff. Atty.*

Plea.

And the said defendants, by their attorneys, come and defend the wrong and injury, &c., and say that they are not guilty of the said supposed trespass and ejectment, as above alleged, and of this they put themselves upon the country, &c.

STEWART, THORNTON & EASTEN,
Attorneys for Defendant.

And afterwards, on the 20th day of November, A. D. eighteen hundred and thirty-seven, a day of the said term, came the parties by their attorneys, and issue being joined, the following verdict was rendered in said cause, to wit:

THE MAYOR AND ALDERMEN of the city of Mobile, *plffs.*
vs.
GEORGE S. GAINES & JONATHAN EMANUEL, *defts.*

Judgment.

This day came the parties by their attorneys, and thereupon came a jury, to wit: Robert Strother and eleven others, good and lawful men, who being elected, tried and sworn well and truly to try the issue joined, upon their oaths do say, "We, the jury, find the defendant not guilty." It is therefore considered by the Court that the plaintiffs take nothing by their action, and that the defendants recover of and from the said plaintiffs their costs by them about their defence in this behalf expended.

MAYOR AND ALDERMEN of the city of Mobile,
vs.
JONATHAN EMANUEL and GEORGE S. GAINES.

Mobile Circuit Court, Fall Term, 1837. Trespass quasi, clausum fregit, to determine title.

Bill of Exceptions.

This cause was tried at the fall term of the Circuit Court of Mobile county, before the Honorable Ezekiel Pickens, one of the Circuit Judges of the State of Alabama. The plaintiffs, among other testimony, submitted to the jury the following evidence. That the defendants were in possession of the premises described in the declaration at the time the suit was brought.

An act of Congress, entitled "An Act, granting certain lots of ground to the Corporation of the city of Mobile, and to certain individuals of said city," passed 20th May, 1824.

A resolution of the Mayor and Aldermen of the city of Mobile, passed the 23d day of April, 1834, in the following words:

Resolved, That the map of the city, as now shewn to the board, be accepted and approved; and it is further resolved, that the names of the streets be the same as heretofore established.

It was also proved by the plaintiffs that the map referred to, was one published by Goodwin & Haire, a copper-plate copy of *of* which was offered in evidence; a copy of such parts of said map as is necessary to refer to is annexed, marked [A.]

It was also proved that there never had been a street in Mobile known as North Boundary street. It was further proven that the premises in question were situate, in May, A. D. one thousand eight hundred and twenty-four, between Church street and a street South S. of Adams street, and below high water as well as low

water mark and the channel of the river, on the 20th May, 1824, and previously.

It was also proven that the premises were North of St. Louis street, as laid out in said map, and that in 1824, Water street did not extend to St. Louis street, and that at that time buildings were few and scattered, above St. Louis street. The defendant offered in evidence a grant from the Spanish Government, hereto annexed, marked (B,) and proved that the defendants claimed title to the premises under that grant.

The court charged the jury that, if the place in controversy was, subsequent to the admission of this State into the Union, below both high and low water mark, then Congress had no right to grant it, and if defendants were in possession, the plaintiffs could not oust them, by virtue of the act of Congress.

That the grant to Forbes extended to high water mark, and that if the place claimed was between high water mark and the channel, in front of the grant, and had been reclaimed by defendants; thus the plaintiffs could not recover in virtue of the act of Congress, and this, notwithstanding the reservation of the rights of way specified in the confirmation of the grant to Forbes.

To all of which charge the counsel of plaintiffs excepted, and asked this signed as a bill of exceptions, which is done and sealed.

EZEKIEL PICKENS. [L. S.]

Exhibit B.—Translation.

Poplar Grove.

I, Don Vincenti Sebastian Pentado, Surveyor General of West Florida, do certify that by the documents annexed to the memorial of John Forbes, a partner of the house of Panton, Leslie & Co., (now continued under the firm of John Forbes & Co.,) reciting the execution of a title in form, to a tract of land of two hundred and sixty-three English acres, superficial measure, and situate in the District of Mobile. It is made manifest that the said house was in possession of the same, by a purchase thereof by William Panton of said firm William Richardson; agreeably to writings in the English language, executed the 23 and 24 of March, 1774, which land appears to have been granted to said Richardson by the British Government, on the 9th of January, 1767, and that the said 263 English acres, when reduced to the geodetic measure of this province, composed 310 arpens, 77 1-8 perches of Paris, of 18 lineal feet each, of said city, and counting 100 superficial perches to the arpent—agreeably to the received and established custom in this and the retroceded province of Louisiana; and by a plat and certificate of survey, of the 2d May, 1802, executed by Don Joses Collins, deputy surveyor, under my predecessor, Don Carlos Gareau Tradian, it appears that the said tract is situated in the aforesaid district of Mobile, on the west side of the river Mobile, and at one quarter of a league more or less to the north of the fort, and bounded

on the east by said river, and on the north by land of Jeremiah Terry, now said to appertain to the Royal domain, on the south by vacant lands, and a lot belonging to the said house of John Forbes & Co., and according to information, on the west by lands of Genovera Fischer and others, said to be on the Royal domain, and although in the foregoing plan, or plat, copied from the original made by Don Joseph Collins, and annexed to the memorial and survey, there is an error in the reduction of acres into arpents, since he supposed 280 of the last to be equal to 263 of the first; as also, an error in the superfices of the Trapezium, which the tract represents, which according to its dimensions contains 287 arpents. Nevertheless, it must always be understood, in order that it may never operate to the prejudice of the party interested, that the said 263 English acres are equal to the three hundred and ten arpents, 77 1-8 perches aforesaid, and also that the distance described in said plat, or plan of survey, between the river, and limits (east) of the tract, and which was left at the time unsurveyed, it being then impossible, has since been rendered useful, by the owners having ditched and drained the same, and which they are to receive in compensation for the above mentioned error, with the reserve, however, of leaving a free passage on the bank of the river, and without altering the figure of the tract on the other sides, and in conformity to the judgment decreed, on the fourth of present month, by Don Juan Ventura Morales, intendant and superintendant general, sub-delegate in this province, Judge of vice-admiralty and of affairs relating to lands, lots, and the Royal domain, by which he orders a title to be executed in favor of said house, in compliance with their memorial. I have granted this in aid of said purpose, at Pensacola, the 14th day of September, 1807.

(Signed) VINCENTI SEBASTIAN PENTADO.

Registered in book H, fol. 33, and continued.

Pensacola, date as above.

(Signed) VINCENTI SEBASTIAN PENTADO.

Don Juan Ventura Morales, intendant pro tem. of this province of West Florida, and sub-delegate, superintendant general of the same, judge of the vice-admiralty and of affairs relating to land, lots, and the Royal domain, &c. Whereas, John Forbes, an inhabitant of this town, and partner of the house of Panton, Leslie & Co., now continued by royal permission for the Indian trade of this province, under the name of John Forbes & Co., has by his memorial to the tribunal of this intendancy, made it appear that since September, 1796, he memorialized the commandant of Mobile on the subject of a tract of land, which his partner William Panton had purchased from William Richardson, and that he also repeated said memorial in May, 1802, for the purpose of obtaining possession, and title in form to said lands, which they have improved and

cultivated since the said year 1796, all which appears in evidence, together with the plat of survey formed by the assistant's surveyor general, Don Josef Collins, and to be found in the memorial and proceedings from pages 1 to 5, inclusive; and by a decree of the 25th Sept. of last year, it was ordered, that the said memorial be referred to the fiscal minister of the Royal treasury, for his examination and opinion who, in his report of 21st October of the same year, is of opinion, that the same be acquiesced in, and granted in the terms prescribed by the regulations, and the plat and survey being examined by the royal surveyor, they the memorialists be furnished with corresponding title. And by an order, or interlocutory decree of the same day, the proceedings in this matter of the 20th February of the present year, were called for, in which reference is made to the proceedings of the 16th of said month, as to the course to be taken in this and other proceedings carried on by the said party, and that it should be made known to them, that they must present the documents referred to in the certified copy; page No. 2, &c., shews the transfer of the land in question, from the royal domain, to the individual possession, and the testimony produced and presented by John Forbes is the before cited document in the English language, with its translation into Spanish, by Don Andres Fernandez, the public interpreter, and praying again that they, (John Forbes & Co.,) may be sustained in possession, and obtain their title to the said land; and by a decree of the 9th March, it was ordered that the said interpreter should certify to the said translation under oath, and that the same be submitted to the fiscal minister, who makes evident, in his report of 6th April last, the necessity of keeping in view the article of the treaty of peace, made in consequence of the conquest of this country, and which relates to the property which could be disposed of British subjects; the prorogation of the time granted to them, (to dispose of the property), or any other royal order on this subject; which being agreed to by the tribunal, a certified copy of said article was ordered, also a copy of the royal order, in which the time is prolonged to the inhabitants for their leaving the country, and the memorial being again referred to the said fiscal minister, with the aforesaid certified copies of the article and royal order; and John Forbes having presented on two occasions, first the protection given by the governor and general commandant of St. Augustine of Florida, to John Leslie, one of his partners, on the 2d June, 1805, to warrant the establishment of the store, made by the company in the neighbourhood of the Appalachies, as also the judicial enquiry made before the commandant of Mobile, tending to justify their rights of property to said land, from the time of the British government in this country, which documents, together with the memorial, were referred to, and examined by the fiscal minister, by a decree of the 6th April last, together with the result of his opinion, given the first of the present month, demanding the proceedings in the case, and citation of the parties

in order to decree accordingly, with the concurrence and advice of the assessor, pro tem. Judgment was pronounced on the fourth day of the present month, which is as follows:

Having seen the proceedings in this case, together with the report of the fiscal minister of the Royal treasury, and the legitimate acquisition of the lands, comprehended in page No. 1, being made evident, and supported, say *farther*, 263 English acres, superficial measure, made by Wm. Panton, during the time said province belonged to the Brittish government, and the legal and public possession thereof, by William Pattison, from whom the rights is derived, and in consequence of what has been declared by this tribunal in the decree of 17th February last, wherein it is declared that the circumstance of the individuals of the house of Panton, Leslie & Co., (now John Forbes & Co.) being foreigners, should be no obstacle, or bar, as to the common course to be pursued, and the legal determination to be given in this and other similar proceedings. It is therefore declared that this house, (J. F. & Co.) should be protected, as by the present (decree) they are protected in possession of the said tract of land, so that in no time to come, they can be molested, or disturbed in their possession of the same, on account of its being Royal domain, with which intention the corresponding title should be issued to them in the ordinary form, and consequently the plat (or figurative plan) made by Don Josef Collins, the assistant surveyor, to be corrected, as is done by Don Vincenti Sebastian Pentado, the surveyor general of this province, in the copy which he has made of it, with the certificate which follows, by which it appears, that the 263 English acres reduced to the geodetic measure of this province, compose 310 arpents, 77 1-8 perches of Paris, consisting of 18 lineal feet each perch, of said city; and one hundred superficial perches to the arpent, superficial measure, according to the *revised* custom of these provinces, and by the process of survey, made the 2d May, 1802, by said Collins, it is shewn that the tract of land in question is situate in the district of Mobile, and on the west side of the river, a quarter of a league, more or less, to the north of the fort, and terminated by the bank of said river on the east side, and bounded on the north by lands of Jeremiah Terry, said now to be Royal domain; on the south by vacant lands, and a lot belonging to said house, (J. F. & Co.), and according to information, on the west, by lands of Genevera Fischer and others, which is said to belong to the Royal domain; and although, in the foregoing plan, copied from the original, made by Don Josef Collins, there is an error in the reduction of acres into arpents, supposing 280 of the last to be equal to 263 of the first; as also an error in the superfices of the trapezium, which figure said land represents, which according to its dimensions contains 287 arpents. Nevertheless, it must always be understood, in order that it may never operate to the prejudice of the party interested, that the said 263 English acres are equal to the 310 arpents, 77 1-8 perches, aforesaid, as calculated by the said surveyor general; and

that the distance in the plat marked out, as being from the river to the limits, (E), of the land, and left unsurveyed at that period, being impossible, has since been rendered useful by the owner having ditched and drained the same, and which they are to receive in compensation for the above mentioned error, with the reserve, however, of leaving a free passage on the bank of the river, without altering the figure of said tract on the other side; whereupon, exercising the power which the king, our lord, (God preserve him,) has confided in me, in his Royal name, I confirm and ratify to the before mentioned John Forbes & Co., the possession of the three hundred and ten arpents, and seventy-seven perches and one eight, of land, which are specified and contained in the plat, No. 1809, with the correction made by the surveyor general, in order that they may as their own property, possess, sell, or dispose of the same, at their own free will and pleasure, (provided it does not interfere with the claims of a third party,) with the condition that they have to observe and comply with the land regulations, made and published by this intendency, the 17th July, 1799, as far as it relates to the local situation and quality of the lands.

In testimony whereof, I have ordered the execution of the present title. Signed with my hand, and sealed with the [SEAL.] seal of my arms, and countersigned by the undersigned, Secretary pro tem. of this Intendancy; in whose office, as well as in that of the Minister of the Royal Treasury, it shall be registered and due note taken.

Given at Pensacola, the 25th Sept., 1807.

(Signed,) JUAN VENTURA MORALES,
FRANCO. GENTERRES DE ARROY.

The above decree has been duly noted, and the foregoing title registered in pages No. 72, 73, 74, and 75, of the book kept for that purpose in office under my charge.

Pensacola, 25th Sept., 1807.

(Signed,) FRANCO. GENTERRES DE ARROY.

Principal Accomptant's Office of the Province.

The foregoing title has been entered in pages 97, 98, and 99, of the book kept for that purpose.

Pensacola, October, 1807.

(Signed,) JUAN FRANCO ARMAND DE COURVILLE.

STATE OF ALABAMA, *Mobile County.*

I, Malcolm J. McRae, clerk of the Circuit Court for Mobile county, and State aforesaid, do hereby certify that the foregoing

fourteen pages contain a true copy of the record and proceedings in the case of the Mayor and Aldermen of the city of Mobile, plaintiffs, and Jonathan Emanuel and George S. Gaines, defendants; as the same remain on file in my office.

In testimony whereof, I hereto set my hand, and cause the seal of the said Circuit Court to hereto annexed, [SEAL.] this tenth day of May, in the year of our Lord one thousand eight hundred and thirty-eight.

Attest: M. J. McRAE, *Clerk, Cty.*

Upon which writ of error and transcript of record, proceedings were had in the Supreme Court, as follow, to wit:

STATE OF ALABAMA,
SUPREME COURT, *of June Term, in the year of our Lord one thousand eight hundred and thirty-eight.*

MAYOR AND ALDERMEN of the City of Mobile,
vs.
JONATHAN EMANUEL and GEORGE S. GAINES.

And the said plaintiffs now come into Court by William Hale, their attorney, and say there is error in the said record, in this, that the charge of the Judge on the tryal of the said cause is against law.

And also that there is error in this, that the said charge of the said Judge denies that the United States had right and power to grant the premises in question. And that there is also error in this, that the said charge of said Judge maintains that the title to the premises in question is in the defendant.

WILLIAM HALE, *Att'y and of Counsel for Plffs.*

There is no error in the record.

STEWART, THORNTON & EASTEN,
Attos. for Defts. in Error.

At June Term, 1838, this cause was continued; and now at this day, to wit, at January Term, 1839, and on the eighth day of February, 1839.

Present:

The Honorable HENRY W. COLLIER, *Ch. Justice.*
JOHN J. ORMOND, *Judge.*

Judge GOLDTHWAITE, not sitting.

The following entry was made:

Because the Court would further consider of the matters of law arising in these cases, day is given said parties until the next term of this Court.

At January Term, 1839, this cause was continued; and now at this day, to wit, at June Term, 1839, and on the 18th day of June, 1839.

Present:

The Honorable Henry W. Collier, *Ch. Justice*,
and John J. Ormond.

Judge Goldthwaite, not sitting.

This day again came said parties by their attorneys, and the record in this cause having been fully considered, and mature deliberation thereon had, it seems to the Court that in the record and proceedings of said Circuit Court, there is no error. Therefore, it is considered that said judgment be affirmed; that said Jonathan Emanuel and George S. Gaines recover of the Mayor and Aldermen of the city of Mobile, the costs of this cause in this Court, and in said Circuit Court.

Know all men by these presents, that we, the Mayor and Aldermen of the city of Mobile, and R. C. McAlpin, are held and firmly bound unto Jonathan Emanuel and George S. Gaines, in the full and just sum of two hundred dollars, to be paid to the said Jonathan Emanuel and George S. Gaines, their certain attorney, executors, administrators, or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 21st day of October, in the year of our Lord one thousand eight hundred and forty.

Whereas, lately at a Supreme Court of the State of Alabama, in a suit depending in said court, between the Mayor and Aldermen of the city of Mobile, plaintiffs in said Supreme Court, and Jonathan Emanuel and George S. Gaines, defendants in said Supreme Court, judgment was rendered against the said Mayor and Aldermen of the city of Mobile; and the said Mayor and Aldermen of the city of Mobile having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Jonathan Emanuel and George S. Gaines, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington the second Monday of January, in the year 1841.

Now, the condition of the above obligation is such, that if the said Mayor and Aldermen of the city of Mobile shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of Mayor and Aldermen of the city of Mobile, by R. C. McAlpin, Att'y.

R. C. McALPIN, *Att'y*, [SEAL.]

HENRY W. COLLIER, *Chief Justice of the Supreme Court of the State of Alabama.*

I, James B. Wallace, Clerk of the Supreme Court of the State of Alabama, do hereby certify that the foregoing sheets, from page three to page twenty, contains a full and complete transcript of the record and proceedings and final judgment in the case of the Mayor and Aldermen of the city of Mobile, against Emanuel and Gaines, decided in said Supreme Court, at the June Term, 1839, of said Court; as also a copy of the bond for the writ of error sued out in said cause, to the Supreme Court of the United States.

In testimony whereof, I have hereunto set my hand, and affixed the seal of said Court this 21st day of October, 1840. [L. S.]

JAMES B. WALLACE, *Clerk of the Supreme Court of the State of Alabama.*

THE MAYOR AND ALDERMEN of the City of Mobile, *vs.* EMANUEL AND GAINES.

Copy of an Opinion delivered on the day of June, 1839, by Chief Justice Collier.

This was an action of trespass, brought by the plaintiffs against the defendants, in the Circuit Court of Mobile, to try the title to, and recover the possession of, a certain lot of ground situate and being in the city of Mobile.

The plaintiffs predicated their claim upon an act of Congress of the 26th of May, 1824, entitled "An Act granting certain lots of ground to the corporation of the city of Mobile, and to certain individuals of said city."

The terms of that act, so far as material to the plaintiffs' case, are as follows:

"*Be it enacted, &c.* That all the right and claim of the United States to the lots known as the Hospital and Bake-house Lots, containing about three-fourths of an acre of land in the city of Mobile, in the State of Alabama; and also all the right and claim of the United States to all the lots not sold or confirmed to individuals either by this or any former act, and to which no equitable title exists in favor of any individual, under this or any other act, be-

tween high water mark and the channel of the river, and between Church street and North Boundary street, in front of the said city, be, and the same are hereby, vested in the Mayor and Aldermen of the said city of Mobile, for the time being, and their successors in office, for the sole use and benefit of the said city forever.

The plaintiffs having given in evidence a map of the city, and proved its adoption by the authorities of the corporation, then showed that the premises in question were situate, in May, 1824, and previously, between Church street and a street south of Adams street, and below both high and low water marks and the channel of the river.

The defendants offered in evidence a grant from the Spanish authorities, which attached to the bill of exceptions, and claimed title under that grant. Without pretending to set it out, it will be sufficient to say, that it is the same grant which made a part of the record in Hogan *et al.* vs. Campbell *et al.*, (8 Porter R.) and the legal effect of which is there settled by the opinion of the court. "The court charged the jury, that if the place in controversy was, subsequent to the admission of this State into the Union, below both high and low water marks, then Congress had no right to grant it; and if defendants were in possession, the plaintiffs could not oust them by virtue of the act of Congress.

"That the grant to Forbes extended to high water mark; and that if the place claimed was between high water mark and the channel, in front of the grant, and had been reclaimed by defendant, then the plaintiff could not recover in virtue of the act of Congress; and this, notwithstanding the reservation of the right of way specified in the confirmation of the grant to Forbes.

The Spanish grant, under which the defendants claimed title, was confirmatory and in extension of a British grant made in 1767. By the latter, was embraced the land to high water mark only; while the former conveyed to its grantee the intervening space between high water mark and the channel of the river. (Hogan *et al.* vs. Campbell, 8 Porter's R. 9.)

In the second instruction, then, the Circuit Court erred in charging the jury, "that the grant to Forbes extended to high water mark." Whether there is error in the first instruction, we do not propose to inquire, since it is clear that the plaintiffs could not have been prejudiced by the instructions to the jury, as they were not entitled to recover. It has been repeatedly decided by this, as well as other appellate Courts, that a judgment will not be reversed for a misdirection of the judge to the jury, if it appears that the party complaining could not have been injured. Now, in the case before us the plaintiffs could claim nothing under the act of Congress; there was no vacant space between high and low water mark; all had been "*sold and confirmed*" to Forbes: so that it is perfectly immaterial what view may have been taken of the case in the charge given by the Circuit Court to the jury.

There is no available error in the record, and the judgment is affirmed.

COLLIER.

A copy—Test:

JAMES B. WALLACE, *Clerk of the Supreme Court of the State of Alabama.*

Filed 9th March, 1841.